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IN THE

Supreme Court of the United States

IKON OFFICE SOLUTIONS, INC., AND
GENERAL ELECTRIC CAPITAL CORPORATION,
Petitioners,

v.

NEWCAL INDUSTRIES, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Because it opposes certiorari, NewCal duly asserts (Opp. 1, 3) that the decision below involves only a "fact-bound" application of "conventional legal standards."[1] No characterization could be less accurate. All in a single case, the Ninth Circuit has served up not one but two circuit conflicts; it has ignored and violated this Court's main precedent on RICO's proximate cause element; and it has converted the Declaratory Judg-

[1] As in the petition, "NewCal" refers collectively to all respondents, and "IKON" refers to both petitioners. As NewCal notes (Opp. iii n.1), Pacific Office Automation (another of IKON's competitors) was a party below and is a respondent here even though the Ninth Circuit excluded it from the case caption.

ment Act into an engine for destroying contracts involving thousands of non-parties. Few antitrust or RICO cases call out more clearly for this Court's intervention.

I. THE DECISION BELOW UP-ENDS BASIC PRINCIPLES OF ANTITRUST MARKET DEFINITION

NewCal's central refrain is that "[l]egal presumptions based on formalistic market theories must give way to the facts on the record in an antitrust case." Opp. 37-38; *accord id.* at 17-18. But this Court has long understood that bright-line rules are indispensable to sound antitrust analysis.[2] Here, the legal rule NewCal wishes to avoid is a basic principle of antitrust market definition, on which there is universal agreement outside the Ninth Circuit: markets must be defined solely in terms of *goods or services*, not *contractual relationships*. *See* Pet. 18-20.

If applied here, that rule would foreclose NewCal's antitrust claims. NewCal has never alleged that IKON holds market power in any equipment-supply or main-

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[2] *See, e.g., Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (imposing bright-line limitations on predatory pricing claims to avoid overdeterrence); *see also Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007) (extending *Brooke Group* to predatory buying claims); *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 231-232, 234 (1st Cir. 1983) (Breyer, J.) ("[T]he antitrust courts' major task is to set rules and precedents that can segregate the economically harmful price-cutting goats from the more ordinary price-cutting sheep, in a manner precise enough to avoid discouraging desirable price-cutting activity.... Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.").

tenance market defined by goods or services alone rather than the contracts IKON has struck. Nor could it: any such market is "indisputably competitive," and IKON is merely one of many companies vying for a share of it. Pet. App. 13a. The only purported "market" that NewCal claims IKON *has* "monopolized" consists of the customers with whom IKON has negotiated extension contracts. *See id.* at 6a-7a.[3] NewCal's antitrust claims thus depend on the answer to a basic legal question: may courts define antitrust markets in terms of a defendant's contractual relationships?

The Ninth Circuit's decision answers that question in the affirmative and thus contradicts the uniform view elsewhere that markets may *not* be defined in terms of contractual relationships. For example, in *Queen City Pizza, Inc.* v. *Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997), the Third Circuit held that "contractual restraints" cannot "render otherwise identical products non-interchangeable for purposes of relevant market definition," *id.* at 438, even though (by definition) such restraints affect the contracting parties' ability to choose competitive alternatives. The Second Circuit has likewise held that "[e]conomic power derived from contractual arrangements affecting

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[3] The parties have used the term "flex contracts" to denote the contractual extensions that IKON negotiates with customers as the original contracts approach the end of their terms. Extensions of term contracts are ubiquitous and uncontroversial in themselves. NewCal nonetheless alleges (Opp. 3-7) that IKON committed fraud in persuading its customers to extend their contracts. If those allegations were true, the defrauded customers could likely assert a variety of claims against IKON. The questions presented here relate to whether IKON's *competitors* could also sue IKON under the antitrust laws and RICO.

a distinct class of consumers cannot serve as a basis for a monopolization claim." *Hack* v. *President & Fellows of Yale College*, 237 F.3d 81, 85 (2d Cir. 2000).

These were not throw-away lines, as NewCal suggests (Opp. 13-14); they were bright-line holdings. Nor is it possible to distinguish those holdings, as NewCal tries to do, on the ground that the contracts in question were "voluntary," whereas the contractual renewals here were allegedly procured by fraud. Opp. 14. As we have explained (Pet. 18-19), fraud can give rise to various causes of action, but it cannot give rise to antitrust liability unless it harmed competition in some *properly defined antitrust market*. Under well-established precedent, that question of market definition is logically antecedent to any question about whether the defendant possessed and abused power in whatever market is defined. *See* Pet. 18-19. And on that antecedent question, the uniform rule outside the Ninth Circuit is that markets must be defined independently of contractual relationships, and that allegations of fraud do not make otherwise impermissible market definitions permissible. *See* Pet. 20; IIB Areeda & Hovenkamp, *Antitrust Law* ¶¶ 519a, 519b, at 190, 195 (3d ed. 2007).[4]

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[4] NewCal cites *Maris Distributing Co.* v. *Anheuser-Busch, Inc.*, 302 F.3d 1207, 1223 (11th Cir. 2002), for the proposition that "[c]ontracts . . . may run afoul of the antitrust laws, as evidenced by the fact that § 1 of the Sherman Act prohibits any '*contract*, combination . . . , or conspiracy in restraint of trade.'" Opp. 16 (internal quotation marks omitted; alterations in original). That truism is irrelevant. A company may of course violate Section 1 by agreeing with others to "restrain trade." But the substantive ban on such conduct has no bearing on how to *define antitrust markets*. And *Maris* confirms that an antitrust market may *not* be defined by reference to contracts. *See* 302 F.3d at 1219 ("courts must attempt to ascertain a defendant's economic position in the relevant

The decision below turns that rule on its head, with predictably absurd consequences. Under the Ninth Circuit's approach, any corporate plaintiff could sue any rival, no matter how competitively insignificant, for improperly retaining the business of the customers with whom it has contracts. Relative size and conventional notions of market power would make no difference. In the Ninth Circuit's words, a large company could sue a small one simply for "exploiting its unique position—its unique contractual relationship"—with its own customer base (Pet. App. 15a), whose business the small company "monopolizes" by definition. For example, the nation's largest wireless service provider could sue a tiny upstart as a "monopolist" simply by alleging that the upstart had "defrauded" its customers into renewing their service contracts. In fact, IKON is analytically indistinguishable from the defendant in that scenario. The Ninth Circuit acknowledged, and NewCal does not dispute, that IKON has no "market power in the nationwide market for copier equipment leases" or even "in the nationwide market for Canon and Ricoh-brand copier equipment services." *Id.* at 7a.

This point underscores the critical difference between this case and *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451 (1992), on which the Ninth Circuit and NewCal rely. In that case, Eastman

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market, rather than its power pursuant to a particular contract, when considering whether a defendant has market power"); *accord Schlotzsky's, Ltd.* v. *Sterling Purchasing & Nat'l Distrib. Co.*, 520 F.3d 393, 408 (5th Cir. 2008) (" 'Economic power derived from contractual agreements . . . has nothing to do with market power, ultimate consumers' welfare, or antitrust.' " (quoting *United Farmers Agents Ass'n* v. *Farmers Ins. Exch.*, 89 F.3d 233, 236-237 (5th Cir. 1996))).

Kodak allegedly dominated the "markets" (if properly defined as such) for the provision of parts and services for customers with Kodak machines, irrespective of any contractual arrangements. *See id.* at 464-465. IKON has no comparable market position because it is not a manufacturer. It is merely one of many companies that compete to provide equipment (made by others), parts, and maintenance services. Pet. App. 2a, 36a.

Finally, although the decision below should be reversed even if *Kodak* remains undisturbed, the Ninth Circuit's pervasive reliance on *Kodak* presents an important opportunity for this Court to revisit that decision after 16 years of controversy. *See* Pet. 14-15. NewCal claims that *Kodak* is not precedentially important enough to warrant such reconsideration because, according to one law review article, " '*Kodak* has been narrowed to the point where it is simply no longer an effective weapon for antitrust plaintiffs.' " Opp. 17 n.23 (quoting Goldfine & Verrasi, *The Fall of the* Kodak *Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 Antitrust L.J. 209, 210 (2004-2005)). But NewCal omits the key exception noted by that article: among the lower courts, "[t]he Ninth Circuit offers by far the most favorable jurisdiction for plaintiffs bringing *Kodak*-style lock-in claims." Goldfine & Verrasi, *supra*, at 226. The decision below removes any doubt that the Ninth Circuit has applied *Kodak* with anomalous breadth. Indeed, that court has now extended *Kodak* far beyond any plausible interpretation of this Court's original rationale. This Court's intervention is amply warranted.

II. THE NINTH CIRCUIT'S DISREGARD OF *ANZA* WARRANTS EITHER PLENARY REVIEW OR SUMMARY REVERSAL

In *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), this Court established the bright-line principle that "[a] RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." *Id.* at 460. NewCal has claimed nothing more here, and the Ninth Circuit did not conclude otherwise; instead, it simply ignored *Anza*.

NewCal tries to patch this hole by asserting that it *has* claimed something more—namely, that IKON "specifically targeted" NewCal for competitive disadvantage. Opp. 23. This is untenable. As NewCal concedes in a footnote, all it has claimed is that IKON expressed an unremarkable desire to preserve its existing customer base "from the competition," Opp. 23 n.29, which consisted of many companies in this robustly competitive market. Because, by definition, no company can build market share *except* by keeping current and potential customers from doing business with "the competition," NewCal's proximate-cause theory is precisely what *Anza* deems inadequate: a mere claim "that the defendant's aim was to increase market share at a competitor's expense." 547 U.S. at 460.[5]

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[5] NewCal argues (Opp. 24-25) that "in *Anza*, the RICO activity was targeted solely at the State of New York" rather than the plaintiff competitor. That is wrong. This Court credited claims that the *Anza* defendants "sought to gain a competitive advantage" over the plaintiff through the conduct in question but concluded that such claims do not satisfy the proximate cause requirement. 547 U.S. at 460; *see also id.* at 454-455. NewCal also argues that this case differs from *Anza* on the theory that "NewCal paid monies to IKON." Opp. 25. By this, NewCal means only

NewCal also suggests (Opp. 21-24) that this Court somehow altered the relevant analysis when it decided *Bridge* v. *Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131 (2008). But as we have explained (Pet. 27 n.11), *Bridge* addressed a distinct issue: whether a plaintiff alleging mail or wire fraud as a RICO predicate offense must show that it, rather than some third party, *relied* on some misrepresentation by the defendant. This Court held that such "first-party reliance" is not "an indispensable requisite of proximate causation" and that its absence "is not in and of itself dispositive." 128 S. Ct. at 2144. But the Court did not thereby overrule *Anza's* central holding that a RICO plaintiff cannot establish proximate cause simply by "claiming that the defendant's aim was to increase market share at a competitor's expense." *Anza*, 547 U.S. at 460.[6]

If anything, *Bridge* reaffirms that, under *Anza*, NewCal fails the proximate-cause requirement. The Court found that the *Bridge* plaintiffs, unlike the *Anza* plaintiff, could satisfy the proximate-cause requirement because they were likely "the *only* parties injured by

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that it took customers from IKON by helping them cover the charges they owed IKON for exiting their contracts early. *See* Pet. App. 36a-37a. Such voluntary customer-assistance initiatives come no closer to satisfying the proximate-cause element than did the revenue losses claimed by the *Anza* plaintiff in response to the defendants' alleged fraud there.

[6] NewCal seeks to gain mileage (Opp. 26-27) from *Bridge*'s suggestion that a hypothetical plaintiff could establish proximate cause if a defendant defamed it in letters to the plaintiff's customers. *See* 128 S. Ct. at 2139. That dictum is irrelevant here. NewCal alleges not that IKON stole NewCal's customers by attacking NewCal, but that IKON retained its own customers by misrepresenting its own services and contractual provisions.

[the *Bridge* defendants'] misrepresentations" and "no more immediate victim is better situated to sue." 128 S. Ct. at 2144; *compare Anza*, 547 U.S. at 460 ("The requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims."). Here, in contrast, if NewCal's factual allegations were true, there *would* be more "immediate victim[s]" of the purported "fraud" who are "better situated to sue" IKON—the supposedly defrauded customers.

Although IKON repeatedly brought *Anza* to the Ninth Circuit's attention (*see* Pet. 12-13 n.6), that court did not even cite *Anza*, much less try to distinguish it. This Court does not typically allow a lower court decision to stand if, as here, it ignores and flatly contradicts a decision of this Court. If this Court grants plenary review of any other question presented in the petition, it should review the proximate-cause question too; otherwise, it should summarily reverse on that question. *See, e.g.*, *Florida* v. *Meyers*, 466 U.S. 380, 382 (1984) (summarily reversing where court below "either misunderstood or ignored our prior rulings").

III. This Case Presents An Intractable Circuit Conflict Concerning Association-In-Fact RICO "Enterprises"

NewCal has alleged that a hodgepodge of unrelated corporations and law firms joined together to form a racketeering "enterprise." Following its prior decision in *Odom* v. *Microsoft Corp.*, 486 F.3d 541 (9th Cir.) (en banc), *cert. denied*, 128 S. Ct. 464 (2007), the Ninth Circuit excused NewCal from any obligation to plead or prove any separate organizational structure for this supposed "enterprise." *See* Pet. App. 28a.

NewCal acknowledges that this holding conflicts with the decisions of at least five other circuits. Indeed, NewCal concedes that this "circuit split on the degree of structure required for a RICO enterprise has existed since the 1980's," that this split "is now five to five," and that "Congress has not acted to amend the statute." Opp. 29-30. Despite NewCal's contrary impression, these are reasons to *grant* certiorari, not to deny it. So long as this conflict persists, plaintiffs will continue funneling RICO suits like this into the circuits that embrace the anything-goes approach to allegations and proof of association-in-fact enterprises. This Court should intervene now to stop such unseemly forum-shopping and restore national consistency to this critical area of federal law.

NewCal also posits that it *has* pleaded a coherent structure for the supposed "enterprise" and that the Ninth Circuit would have so concluded had it joined the other side of this split. Opp. 33-34. That is both incorrect and irrelevant. It is incorrect because NewCal has not in fact identified a meaningful structure for this putative "association in fact" (consisting of IKON, equipment manufacturers, financing companies, two law firms, and an assortment of other entities) beyond the ordinary bilateral contracts struck by various pairs of entities within the heterogeneous mix. *See* Pet. 28-29. And it is irrelevant because this Court need not itself address the adequacy of NewCal's allegations if it concludes that plaintiffs in NewCal's position must plead and prove a coherent organizational structure; it could remand for a determination of that issue in the first instance.

IV. CERTIORARI IS WARRANTED TO REVERSE THE NINTH CIRCUIT'S MISUSE OF THE DECLARATORY JUDGMENT ACT TO NULLIFY THE REQUIREMENTS OF RULE 23

Finally, this Court should grant certiorari to reverse the Ninth Circuit's bizarre conclusion that the Declaratory Judgment Act permits abrogation of IKON's contracts with thousands of non-parties to this suit. This holding subverts the requirements of Rule 23 by producing the same massively preclusive effects as class-action litigation without any of the procedural safeguards, such as notice to affected parties and fair representation of their interests. *See* Pet. 32-33. This holding also contradicts the traditional rule against using the Declaratory Judgment Act to "mak[e] a mockery" of such procedural requirements "by the simple expedient of creative labelling—styling an action as one for declaratory relief." *Gilbert* v. *City of Cambridge*, 932 F.2d 51, 57 (1st Cir. 1991).

In response, NewCal ignores *Gilbert*; denies the existence of the principle *Gilbert* adopts; and cites three other cases that have no bearing on the issue. *See* Opp. 36 & n.48. NewCal also argues that it had "standing" to invoke the Declaratory Judgment Act on the ground that IKON had threatened to sue it for interfering with its contracts. Opp. 35. But the question here is not whether there was sufficient adversity between the parties to support jurisdiction to consider allegations by NewCal that its conduct did not rise to the level of tortious interference. The question is whether a court may extinguish contracts involving thousands of non-parties who were given neither notice nor an opportunity for fair representation. The answer to *that* question is no.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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